Public Prosecutor v Wan Mohamad Nur Firdaus bin Abd Wahab and other appeal

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS W-05(H)-340–08 OF 2017 AND W-05(H)-367–08 OF 2017
MOHTARUDIN BAKI, HARMINDAR SINGH AND RHODZARIAH BUJANG JJCA
18 SEPTEMBER 2018

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Criminal Law — Sentence — Appeal against sentence — Terrorism related offences — Degree of participation — Some terrorism offences were more serious than others — Young first offender — Whether court should impose deterrent sentence — Penal Code ss 130J(1)(a) & 130JB(1)(a)

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These two appeals were from the decision of the High Court which sentenced the accused to eight years and five years imprisonment for two charges under ss 130J(1)(a) and 130JB(1)(a) of the Penal Code. Both the public prosecutor and the accused was appealing against the sentences passed. The accused was discovered to have committed the crimes he was charged with when he was arrested and his handphone was seized. From analysis conducted, his phone was found to have contained 23 images connected to the terrorist group Islamic State ('IS'). The accused was also found to have sworn an allegiance to IS. The accused was 22 years old at the material time and pleaded guilty to both charges in the first instance. His mitigation were that of his family background and that he was influenced to commit the offences by friends and social media, he was remorseful and promised not to commit the like offences in the future. The deputy public prosecutor in his submission urged for a deterrent sentence.

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Held, dismissing the appeal of the public prosecutor and allowing the appeal of the accused, reducing the sentence to five years imprisonment for the first charge and to two years imprisonment for the second charge, both sentences to run concurrently from the date of arrests:

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(1) Although terrorism offences were serios in nature, they should not be treated on equal footing for some acts of terrorism were more heinous than the others. The degree of participation by the accused with the said terrorist group was passive and minimal. He did nothing more than swore that allegiance to it and that the impugned images were downloaded from the internet and the accused never did anything more than to keep them there (see paras 5 & 8).

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(2) For the second charge, the maximum punishment was seven years imprisonment and further, imprisonment was not mandatory. It was not explained by the High Court judge why he imposed five years

A imprisonment on the accused when it was not disputed that he was a young first offender who pleaded guilty to the charge at first opportunity. There was no justification for imposing such a heavy sentence on the accused (see para 9).

B **[Bahasa Malaysia summary**

Kedua-dua rayuan ini adalah daripada keputusan Mahkamah Tinggi yang mensabitkan tertuduh kepada lapan dan lima tahun pemenjaraan atas dua pertuduhan iaitu dibawah ss 130J(1)(a) dan 130JB(1)(a) Kanun Keseksaan. Tertuduh dan Pendakwa Raya merayu atas hukuman yang diberikan. Tertuduh
C didapati telah melakukan kesalahan sepertimana yang dipertuduhkan apabila dia ditangkap dan telefonnya dirampas. Daripada analisa yang dijalankan, telefon tertuduh didapati mengandungi 23 gambar berkaitan dengan kumpulan pengganas Islamic State ('IS'). Tertuduh juga telah didapati memberikan ikrar taat setia kepada IS. Tertuduh berusia 22 tahun pada masa
D yang material dan mengaku salah atas kedua-dua pertuduhan sewaktu peluang pertama muncul. Hujahan mitigasinya adalah latar belakang keluarganya dan dia telah dipengaruhi untuk melakukan kesalahan tersebut oleh rakan-rakannya dan media sosial. Tertuduh menyesal dan berjanji untuk tidak mengulangi kesalahan sedemikian rupa di masa akan datang. Timbalan
E pendakwa raya dalam hujahannya memohon agar satu hukuman pencegahan diberikan.

Diputuskan, mengenepikan rayuan pendakwa raya dan membenarkan rayuan
F tertuduh, mengurangkan hukuman kepada lima tahun pemenjaraan untuk pertuduhan pertama dan dua tahun pemenjaraan untuk hukuman kedua, kedua-dua hukuman untuk berjalan secara serentak bermula daripada tarikh tangkap:

(1) Walaupun kesalahan berkaitan dengan keganasan adalah serius, ianya
G tidak sepatutnya dilayan secara sama rata dengan beberapa tindakan keganasan yang lebih kejam daripada yang lain. Tahap penglibatan tertuduh dalam kumpulan pengganas tersebut adalah pasif dan minima. Dia tidak melakukan apa-apa kecuali memberikan sumpah setia kepadanya dan bahawa gambar-gambar tersebut telah dimuat turun
H daripada internet dan tertuduh tidak melakukan apa-apa selain daripada menyimpannya dalam telefon tertuduh (lihat perenggan 5 & 8).

(2) Untuk pertuduhan kedua, hukuman maksima adalah tujuh tahun pemenjaraan, lanjutan itu, pemenjaraan adalah tidak mandatori. Ianya tidak diterangkan oleh hakim mahkamah tinggi mengapa dia
I mengenakan hukuman pemenjaraan lima tahun kepada tertuduh memandangkan ianya tidak dinafikan bahawa dia merupakan pesalah kali pertama yang mengaku salah keatas pertuduhan seawal mungkin. Tiada justifikasi untuk mengenakan hukuman yang berat keatas tertuduh (lihat perenggan 9).]

Notes

For cases on appeal against sentence, see 4(3) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 4165–4210.

Cases referred to

Mohamed Abdullah Ang Swee Kang v PP [1988] 1 MLJ 167, SC (refd)
Pendakwa Raya lwn Bukhori bin Che Noor Perbicaraan Jenayah No 45S0-40–03 Tahun 2017 (unreported), HC (refd)
Pendakwa Raya lwn Imam Wahyudin bin Karjono dan satu lagi dan kes-kes lain [2017] 10 MLJ 582, HC (refd)
Pendakwa Raya lwn Ummi Kalsom bt Bahak [2016] 6 MLJ 407; [2015] 1 LNS 1493, HC (refd)
PP v Aszroy bin Achoi [2018] 9 MLJ 702; [2018] 1 LNS 527, HC (refd)
Sau Soo Kim v PP [1975] 2 MLJ 134, FC (refd)

Legislation referred to

Penal Code ss 130J(1)(a), 130JB(1)(a)
Terrorism Act 2000 [UK]

Appeal from: Criminal Trial Nos 45SO-108 and 109–05 of 2017 (High Court, Kuala Lumpur)

Wan Shaharuddin bin Wan Ladin (Public Prosecutor, Attorney General's Chambers) in Criminal Appeal No W-05(H)-340–08 of 2017 for the appellant.
Mohd Faizi bin Che Abu (Muhd Daniel bin Baharudin with him) (Yusfarizal, Aziz & Zaid) in Criminal Appeal No W-05(H)-367–08 of 2017 for the appellant.
Mohd Faizi bin Che Abu (Muhd Daniel bin Baharudin with him) (Yusfarizal, Aziz & Zaid) in Criminal Appeal No W-05(H)-340–08 of 2017 for the respondent.
Wan Shaharuddin bin Wan Ladin (Public Prosecutor, Attorney General's Chambers) in Criminal Appeal No W-05(H)-367–08 of 2017 for the respondent.

Rhodzariah Bujang JCA:

INTRODUCTION

[1] These two appeals originate from a decision of the High Court in sentencing the accused to eight years and five years imprisonment respectively, for two charges under ss 130J(1)(a) and 130JB(1)(a) of the Penal Code. Both the accused and the public prosecutor ('the PP') were dissatisfied with the said sentences and have each filed an appeal against the same. Having heard their submissions at the joint hearing of the two appeals, we have allowed the appeal of the accused and dismissed that of the public prosecutor. Our reasons for

doing so are enumerated below but first we would reproduce the two charges as contained at pp 9–11 of the appeal record Vol 1:

First charge

Bahawa kamu di antara 25 Mac 2016 hingga 25 September 2016, di sebuah rumah beralamat No. 8, Jalan Cili 24/28D, Seksyen 24, di dalam Daerah Petaling, di dalam Negeri Selangor Darul Ehsan, dengan pengetahuan telah memberi sokongan kepada kumpulan pengganas iaitu Islamic State dengan cara menggunakan aplikasi media social Telegram atas nama Lat Firdaus, dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 130J(1)(a) Kanun Keseksaan yang boleh dihukum di bawah seksyen 130J(1) Kanun yang sama.

Hukuman

Jika disabitkan dengan kesalahan, kamu hendaklah diseksa dengan penjara seumur hidup atau penjara selama tempoh tidak melebihi tiga puluh tahun, atau denda dan bolehlah dirampas mana-mana harta yang telah digunakan atau diniat untuk melakukan kesalahan itu.

Second charge

Bahawa kamu pada 25 September 2016 jam lebih kurang 8.35 pagi, di sebuah rumah beralamat No 8, Jalan Cili 24/28D, Seksyen 24, dalam Daerah Petaling, dalam Negeri Selangor Darul Ehsan, telah memiliki 23 keping imej di dalam telefon bimbit jenama Oppo model R8006 berwarna hitam (Nombor IMEI:356121042654354) yang mempunyai kaitan dengan kumpulan pengganas Islamic State (IS) dan dengan itu kamu telah melakukan satu kesalahan di bawah perenggan 130JB(1)(a) Kanun Keseksaan (Akta 574) dan boleh dihukum di bawah peruntukan yang sama.

Hukuman

Jika disabitkan dengan kesalahan, kamu hendaklah dihukum dengan penjara untuk tempoh tidak melebihi tujuh (7) tahun atau denda dan boleh dilucut hak mana-mana item tersebut.

THE BRIEF FACTS

[2] In summary, the crime committed by the accused was discovered when pursuant to his arrest by the police on 25 September 2016 @ 8.35am, his handphone was seized. From an analysis of the said handphone by the police, 23 images or photographs connected to the terrorist group, Islamic State ('IS') were discovered. Further investigation by the police revealed the accused had on 30 March 2016 @ 7.32am vide a social media chat platform Telegram 'Gagak Hitam', under the name 'Lat Firdaus' swore an oath of allegiance to IS as follows:

SAYA FIRDAUS BERSUMPAH DEMI ALLAH TIDAK AKAN BERKHIANAT KEPADA IKHWAH ANSHAR DAULAH ISLAMIYAH DIMANAPUN BERADA, SIAP MENERIMA AZAB DARI ALLAH, & TIDAK DI TERIMA

BUMI BILA SAYA BERKHIANAT & SAYA MEMBERIKAN INFORMASI PENTING KEPADA THAGHUT BERUPA IDENTITAS, STRATEGI, MAUPUN PERGERAKAN YANG SEKECIL-KECILNYA DARI PERJUANGAN INI ATAU APAPUN YANG DAPAT MEMBAHAYAKAN KESELAMATAN ANSHAR DAULAH LAINNYA. BILA SAYA TERTANGKAP ATAU TERANCAM DIBUNUH, SAYA TIDAK AKAN MEMBERIKAN INFORMASI APAPUN KEPADA MUSUH-MUSUH ALLAH.

INILAH SUMPAH SAYA ATAS NAMA ALLAH SWT, SEMOGA ALLAH MELINDUNGI SAYA LAHIR & BATIN, DUNIA & AKHIRAT AAAMIIN YA RABBAL ALAMIN ...

[3] According to Ahmad El-Muhammady bin Muhammad Uthman El-Muhammady from Pusat Pengajian Asasi of International Islamic University who was asked to analyse the said allegiance, the oath signifies these:

Bay'ah merupakan sumpah yang dilakukan oleh seseorang untuk memberi kesetiaan dan ketaatan kepada ketua (amir) dan kumpulan. Bay'ah merupakan satu upacara penting bagi seorang pengikut untuk menyertai sesuatu kumpulan. Apabila seseorang itu memberikan bay'ah atau sumpah taat setia kepada seseorang atau kumpulan, maka implikasinya seperti berikut:

(i) Seseorang menjadi ahli bagi kumpulan itu secara rasmi

(ii) Ahli bersedia memberi kesetiaan (wala') yang mutlak kepada ketua atau kumpulan

(iii) Bila diberi arahan oleh ketua atau kumpulan, ahli wajib taat atau wajib patuh pada arahan tanpa ragu-ragu (al-taáh)

(iv) Sekiranya ahli tidak akur atau melanggar bay'ah, akan gugur keahlian, dianggap durhaka kepada ketua (amir), wajib dihukum. Hukuman ini dilaksanakan oleh kumpulan atau sumpah untuk mendapat hukuman dari Allah di dunia dan akhirat

(v) Sekiranya dia melanggar sumpah (bay'ah), dia akan mendapat balasan di dunia dan di akhirat.

Accordingly, the accused was charged with the two offences as stated above.

[4] The accused, who was 22 years old at that material time pleaded guilty to both charges at the very instance when he was arraigned before the High Court to face them but the case was postponed to provide him with the services of a lawyer from the National Legal Aid Foundation. In his mitigation, other than his family background such as three school going siblings, aged parents and a mother suffering from hypertension, his then counsel informed the court that the accused was influenced to commit the offences by friends and the social media. He was remorseful and promised not to commit the like offences in the future. The learned deputy public prosecutor ('DPP') in his written submission

of course urged for a deterrent sentence because of the seriousness of the offence and for public interest. The learned High Court judge was moved to impose a sentence of eight years for the first charge and five years for the second charge with both sentences to run from the date of his arrest, that is 25 September 2016. We were in turn moved to allow the accused's appeal against the sentences passed for the following reasons.

MANIFEST SENTENCES

[5] We must state at the outset that it was never our intention, in reducing the sentences passed by the learned High Court judge, to send a signal to the public or particularly would be offenders of this crime, that terrorism related offences are not serious crimes. These offences are a scourge to society everywhere and acts of terrorism have caused untold sufferings and the loss of lives worldwide. We therefore have no intention, in arriving at this decision, to trivialise the same. However, although these offences are serious in nature, nonetheless they should not be treated on equal footing for some acts of terrorism are more heinous than the others. This fact is actually acknowledged by the Sentencing Council of United Kingdom when it came up with a Definitive Guideline to Terrorism Offences for the different types of offences under its Terrorism Act 2000. In the said guidelines, the offences are categorised by two factors, which are culpability and harm. Then certain characteristics of these two factors such as the role played by the accused must be considered by the court. In detail the said characteristics are reproduced below:

PROSCRIBED

Culpabilty demonstrated by one or more of the following:	
A	• Offender in position of trust, authority or influence and abuses their position • Persistent efforts to gain widespread or significant support for organisation • Encourages activities intended to cause endangerment to life
B	• Arranged or played a significant part in the arrangement of a meeting/event aimed at gaining significant support for organisation • Intended to gain widespread or significant support for organisation • Encourages activities intended to cause widespread of serious damage to property, or economic interests or substantial impact upon civic infrastructure
C	• Lesser cases where characteristics for categories A and B are not present

Harm The court should consider the factors set out below to determine the level of harm.	
Category 1	• Evidence that others have acted on or been assisted by the encouragement to carry out activities endangering life • Significant support for the organisation gained or likely to be gained
Category 2	• Evidence that others have acted on or been assisted by the encouragement to carry out activities not endangering life
Category 3	• All other cases

[6] We must say that the above guidelines provide a fair and just consideration for these kind of offences and although not binding upon us, it is still persuasive enough for a determination of this appeal. As submitted by learned counsel for the accused, his participation in IS must be a factor to be weighed by the court and his was just a passive and not an active one.

[7] Another pertinent factor for our consideration is the trend of sentencing for the same offences committed as stated at pp 3–4 of the written submission of learned counsel for the accused before us and that appearing in the learned deputy public prosecutor's written submission before the High Court (at pp 8–9 of Vol 4 of the appeal record) which we desist from reproducing in this judgment save to say this.

The case of *Pendakwa Raya lwn Imam Wahyudin bin Karjono dan satu lagi dan kes-kes lain* [2017] 10 MLJ 582 for an offence under s 130J(1)(a) of the Penal Code where the accused was sentenced to ten years was not just for making that same oath of allegiance to IS but he was also charged for throwing and detonating a bomb at a club (MOVIDA) in Puchong, Selangor. Obviously the accused in this cited case had taken his oath of allegiance to the next extreme level. That of *Pendakwa Raya lwn Bukhori bin Che Noor* Perbicaraan Jenayah No 45S0-40–03 Tahun 2017 (unreported) where the accused was sentenced to seven years imprisonment was for allowing the use of his personal account by IS and in the case of *Public Prosecutor v Aszroy bin Achoi* [2018] 9 MLJ 702; [2018] 1 LNS 527, the accused used his Facebook account to recruit sympathisers to IS for which he was sentenced to seven years and two years imprisonment respectively for the same two charges as in this case but this was *after a full trial*. The accused in this appeal before us, it must be emphasised, pleaded guilty to the charge and it is trite law that such a plea allows the court to give a discount on the sentence (see *Mohamed Abdullah Ang Swee Kang v*

Public Prosecutor [1988] 1 MLJ 167 and *Sau Soo Kim v Public Prosecutor* [1975] 2 MLJ 134).

Another case for comparison is *Pendakwa Raya lwn Ummi Kalsom bt Bahak* [2016] 6 MLJ 407; [2015] 1 LNS 1493 where the accused was charged under s 130J(1)(a) of the Penal Code and was sentenced to two years imprisonment on her own plea of guilty. She was caught when leaving the country to join IS in Syria and the decision was affirmed by the Court of Appeal. A further appeal by the public prosecutor to the Federal Court was dismissed. In all these aforementioned cases, as rightly submitted by learned counsel for the accused before us, there was indeed active participation in the terrorist group by the said accused persons.

[8] Coming back to the facts of this case, we have to agree with learned counsel for the accused that the degree of participation by the accused with the said terrorist group was passive and indeed minimal. He did nothing more than swore that allegiance to it and as for the impugned images in his handphone, as again rightly submitted by his counsel, these were downloaded from the internet through the Telegram application and the accused never did anything more than keep them there — he did not forward them to anyone else. Given the age of the accused, we also cannot discount the probability that the accused was unduely influenced into joining the chat group 'Gagak Hitam', a hipster culture popular with the young.

[9] Another pertinent factor we noted is the fact that for the second charge the maximum punishment was seven years' imprisonment and what is more, imprisonment is not mandatory. We simply failed to understand and it was not explained by the learned High Court judge why he had to impose five years' imprisonment on the accused when it was not disputed that he was a young first offender who had pleaded guilty to the charge at the first opportunity and as stated earlier had done nothing more than keep the said images in his handphone. In other words, there was simply no justification for imposing such a heavy sentence, almost the maximum, on the accused.

[10] Thus, for all the foregoing reasons, we have decided to allow the appeal of the accused and dismissed that of the public prosecutor by reducing the sentence of the first charge to five years' imprisonment and that of the second charge to two years imprisonment, with both sentences to run concurrently from the date of his arrest.

Order accordingly

Reported by Izzat Fauzan